2-1140

FILED
FEB 15 1973
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

October Term 1973

Docket No. 73-72-1140

NICHOLAS GASPARINO,

Petitioner,

- against -

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION

IRVING ANOLIK
Attorney for Petitioner
225 Broadway
New York, New York 10007
(212) 732-3050

(5460) LUTZ APPELLATE PRINTERS, INC.
Law and Financial Printing
South River, N.J. New York, N.Y. Philadelphia, Pa. Washington, D.C.

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In The

Supreme Court of the United States

October Term 1973

Docket No. 73-

NICHOLAS GASPARINO,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, FIRST DEPARTMENT

Statement

Petitioner, NICHOLAS GASPARINO, respectfully prays that this Court issue a Writ of Certiorari to the Supreme Court of the State of New York, Appellate Division, First Department, to review its unanimous affirmance on October 24, 1972, of the conviction of the petitioner in the County Court, Westchester County, for the crime of conspiracy in the first degree. The New York Court of Appeals denied leave to appeal on the 21st day of November, 1972.

The petitioner has been sentenced to 15 years imprisonment and is presently incarcerated.

Opinion Below

The Appellate Division, Second Department, rendered no opinion in connection with this case. A copy of the order of affirmance is annexed however.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

The Court of Appeals denied leave to appeal on November 21, 1972.

Questions Presented

1. Whether petitioner's rights under the Fifth and Fourteenth Amendments, against compulsory self-incrimination, were violated by virtue of the prosecutor's misrepresentation in offering him immunity before the Grand Jury and then indicting him for the very crime about which he was compelled to testify?

(a) Under New York law, the immunity conferred was necessarily transactional and not merely testimonial.

2. Whether petitioner's rights under the Fifth and Fourteenth Amendments were violated by the prosecutor's decision to retroactively vitiate the immunity granted petitioner by the Grand Jury

because petitioner declined to testify at a subsequent trial?

3. Whether the conferral of immunity by a Grand Jury contains an implicit condition subsequent that the immunized witness must also testify at subsequent trial proceedings?

4. Whether a witness who has received immunity from prosecution before a Grand Jury may be indicted for the offense about which he was compelled to testify because he subsequently refused to give evidence at a later trial or is the sole remedy of the prosecutor a proceeding to hold such a recalcitrant witness in contempt?

5. Whether petitioner was intimidated into testifying before a Grand Jury by being held in a quarter of a million dollars bail as a mere material witness, with the implied promise that he could be released only by agreeing to testify before the Grand Jury (Fifth and Fourteenth Amendments)?

6. Whether petitioner was denied a speedy trial in violation of the Sixth and Fourteenth Amendments of the United States Constitution?

Constitutional and Statutory Provisions Involved

The Fifth, Sixth and Fourteenth Amendments of the United States Constitution; Article I, Section 6 of the New York State Constitution; Sections 395 and 619-c of the New York Code of Criminal Procedure; and Section 2447, former New York Penal Law (see 190.40 New York Criminal Procedure Law), are involved herein.

Essential Facts

This case presents an important issue involving conferral of immunity under the laws of the State of New York as they existed at the time that NICHOLAS GASPARINO, the petitioner herein, appeared before a 1968 Grand Jury on the 17th day of December, 1968, in Westchester County.

The petitioner herein was arrested as a material witness on the 5th day of December, 1968, and committed to the Westchester County Jail in lieu of $250,000.00 bail as a material witness in the alleged killing of one Dorothy De Tore.

Later this amount was reduced to $25,000.00. After consulting with his attorney, Vincent W. Lanna, Esq., who informed GASPARINO that he in turn had discussed the matter with Assistant District Attorney Warren Schneider of the District Attorney's office in Westchester County, who had promised complete immunity in exchange for his testimony before the Grand Jury, that he actually did testify before the Westchester County Grand Jury on or about the 17th day of December, 1968.

Both John De Tore and Kenneth Wedra were subsequently indicted for the murder of Dorothy De Tore under Indictment Number 1126/68.

In November of 1969, the petitioner was subpoenaed to testify as a witness at the trial of John De Tore and Kenneth Wedra, but declined to testify, as a result of which his bail was again

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raised to $250,000.00, causing him to be incarcerated again as a material witness (A63-65, 77).*

The District Attorney subsequently procured an indictment from a different Grand Jury, namely the December 1969 Grand Jury, which indicted petitioner for the murder of Dorothy De Tore despite the alleged conferral of immunity.

Because of the seriousness of the charge and the full statements given by the petitioner during his Grand Jury testimony, he had no course other than to plead guilty to the crime of conspiracy to commit murder.

A motion had been made, prior to his plea of guilty, to dismiss the Indictment on the grounds that he had received immunity against prosecution as a result of his testimony before the Grand Jury in 1968. This matter was taken to the Appellate Division on an Article 78 Proceeding in the nature of prohibition, but the Appellate Division denied this relief and the matter was remanded to the County Court for trial. The County Court ordered the case to proceed to trial, as a result of which GASPARINO, fearing that he could be incarcerated for life, bargained to obtain a plea of conspiracy to commit murder (Conspiracy, First Degree).

The Court sentenced petitioner to 15 years imprisonment and, as indicated in the preliminary Statement herein, the Appellate Division of the Second Department affirmed that conviction and the Court of Appeals denied leave to appeal.

* Parenthetical references are to the appendix on appeal.

An essential colloquy that occurred before the Grand Jury which crystallizes the foundation for Petitioner GASPARINO's belief that he was immunized, is set forth in Point I of the brief, infra.

Argument

Point I.

THE PETITIONER WAS DEPRIVED OF HIS FIFTH AND FOURTEENTH AMENDMENT RIGHTS AGAINST COMPULSORY SELF-INCRIMINATION BY VIRTUE OF THE PROSECUTOR'S MISREPRESENTATION IN OFFERING IMMUNITY BEFORE THE GRAND JURY AND THEN INDICTING HIM FOR THE VERY CRIME ABOUT WHICH HE WAS COMPELLED TO TESTIFY. THE IMMUNITY CONFERRED WAS NECESSARILY TRANSACTIONAL AND IT WAS PURE SOPHISTRY ON THE PART OF RESPONDENT TO CONTEND THAT IT WAS MERELY TESTIMONIAL.

This is a most distressing and unusual case. The petitioner herein, NICHOLAS GASPARINO, was indicted for the crime of murder after he had first been arrested as a material witness with respect to the very crime for which he was indicted and later compelled to testify as a witness before a Grand Jury investigating this same murder (the slaying of Dorothy De Tore).

The facts do not seem to be in material dispute, according to the opinion of Judge Beisheim in the Court below, since in his opinion he noted that GASPARINO had been promised immunity for his testimony, which was a sine qua non to the indict-

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ment of Kenneth Wedra and John De Tore, under Indictment No. 1126/68. In the opinion of Judge Beisheim it is apparent that this petitioner would not have testified had he not received immunity. There is no indication that the immunity pledged was to be testimonial nor was he warned that he could be indicted for this crime if he did not testify at the trial. Thus the following colloquy occurred in the Grand Jury, according to the Opinion of Judge Beisheim:

"By Mr. Schneider:

Q. And did there come a time when Vito spoke with you about something that was to be done on behalf of John De Tore? A. Yes sir. Excuse me. For a minute, may I say something? Mr. Lanna advised me to say that immunity should be said before I should say anything. I don't know what he means by that.

Q. Well, you have been promised immunity by the day, have you not? A. Yes.

Q. And I have now said it in front of the Grand Jury, have I not? A. Right. Thank you."

GASPARINO did testify in the Grand Jury, as a result of which an indictment was returned against Wedra and John De Tore. Both those persons were later brought to trial and convicted.

In his affidavit of February 11, 1970, Assistant District Attorney Warren Schneider said that he asked for immunity, but only intended that the

immunity be "testimonial." The statement is palpably unbelievable. The petitioner and his trial counsel were hoodwinked:

> "While the term immunity may have been used in conversations between myself and counsel for the defendant GASPARINO, it was used in an inexact sense. At no time did we ever discuss by specific term 'statutory' or 'transactional' immunity, and if transactional or statutory immunity had been requested by the defendant, the request would have been rejected and he would have been indicted, because it would have been totally senseless to permit one culpable party to go free simply to obtain an indictment against another culpable party without any reasonable assurance that the indictment could subsequently be successfully prosecuted. It was certainly my understanding at the time that Mr. Lanna understood that the consideration being extended to his client was upon condition not only of his Grand Jury testimony, but of his trial testimony as well. The defendant was given testimonial immunity in the Grand Jury because he was permitted to appear and testify without having executed a waiver of immunity. At no time did I request the Grand Jury to give the defendant statutory immunity; at no time did I request the Grand Jury to direct the defendant to answer any question or request the foreman to do so; at no time did the Grand Jury retire in closed session and vote upon any such matter

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or advise your deponent that it had done so, and at no time did I ever inform anyone that it had done so."

The petitioner and his trial counsel relied on the prosecutor's representation that immunity was conferred. It is shocking that he should append a condition subsequent to immunity. There is no basis for such a practice.

Nothing was said about trial testimony at all. Nothing was mentioned that immunity was only testimonial. There was moreover, a stipulation not to prosecute, irrespective of anything else (Code Crim. Proc. §395).

There is no denial of discussions about immunity, and thus immunity precluded prosecution.

As it turned out however, for reasons undisclosed in the record, the petitioner declined to testify at the trial. He was, of course, dealing with accused murderers and perhaps it was quite understandable why he would hesitate to testify under those circumstances. Be that as it may, the only course of action open to the prosecution at that juncture was to ask for a citation for contempt of court on the theory that GASPARINO had lost his privilege against self-incrimination by virtue of the immunity and thus could be compelled to testify notwithstanding the Fifth Amendment privilege. The cases are legion where this has occurred in various circumstances. (See People v. Tramunti, 29 N.Y.2d 28; People v. Masiello, 28 N.Y.2d 287; People v. Mulligan, 29 N.Y.2d 20; and, Matter of Gold v. Menna, 25 N.Y.2d 415).

As a matter of fact, when the case of People v. La Bello and Piccirillo, 24 N.Y.2d 598, came before the Supreme Court of the United States (400 U.S. 548), the case was remanded because our own Court of Appeals noted that immunity in New York conferred before a Grand Jury results in transactional and not testimonial immunity.

The Fifth Amendment privilege against self-incrimination must be interpreted in accordance with Federal standards and may not be emasculated by some "Pickwickian" dilution fabricated by a nisi prius Court. (See, Malloy v. Hogan, 378 U.S. 1; Murphy v. Waterfront Commission, 378 U.S. 52 and Gardner v. Broderick, 392 U.S. 273.)

We submit that the law of New York is not affected by the recent decision of the Supreme Court of the United States in Ziccarilli v. Investigation Com., 32 L. Ed.2d 234, decided May 1972, wherein the United States Supreme Court indicated that transactional immunity was not essential to the enforcement of the Fifth Amendment. That decision, however, sets a minimum standard and does not in any way overrule Matter of Gold v. Menna, supra, or Masiello, Mulligan, or cases of that sort.

We would ask this Court to review the Grand Jury Minutes herein, which it may do since a proper motion was made in the Courts below for dismissal, and we feel that it will determine that there is nothing whatsoever to indicate that transactional immunity was not being offered or that the immunity was contingent upon testimony by

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the petitioner at the trial itself. Having agreed to testify before the Grand Jury under a grant of immunity and then actually testifying, GASPARINO did all that was required. A condition subsequent may not suddenly be engrafted to vitiate a proper conferral of immunity.

It should be noted that the affidavits submitted by the petitioner and by his experienced counsel, Vincent W. Lanna, Esq., were more than sufficient to indicate that, but for the promise of full immunity, there would not have been any testimony before the Grand Jury by this petitioner.

Under New York law, immunity, when granted, is deemed transactional and the recent case of Ziccarilli v. Investigation Commission, supra, has no effect upon New York law.

Indeed, it is submitted that because of the misrepresentations of the District Attorney, the petitioner and his counsel were lulled into a false sense of security.

Moreover, the jockeying around by the prosecutor of bail, which supposedly is required only to assure appearance in court, between $250,000.00 and $25,000.00, and then back up to $250,000.00 again, can only be interpreted as intimidation with the acquiescence of the Court.

The Indictment against Wedra and De Tore could not have been obtained without the testimony of GASPARINO, so, to that extent, he fulfilled his role before the Grand Jury and, had he declined to testify before that Grand Jury, perhaps he could

then have been indicted as a co-defendant of Wedra and De Tore.

GASPARINO was subpoenaed to testify at trial. His refusal to do so could be punished as contempt since he was a witness. His immunity however, could not be vacated retroactively since it had already resulted in a benefit to the prosecution, namely the procuring of the indictments against Wedra and De Tore. Moreover, it is inferable that the testimony of GASPARINO not only gave the prosecution an insight into his knowledge of the crime and his background, but supplied them with a good deal of information that they would not otherwise have obtained.

In Santobello v. New York, 404 U.S. 257 (1971), this Court held that a promise articulated by a prosecutor (in the case at bar, not to prosecute), must be fulfilled and a change in circumstances or change in heart cannot retroactively vitiate that promise.

There is nothing in the record to indicate that GASPARINO was told that his immunity was contingent not only on testifying before the Grand Jury, but also upon testifying in Court.

It should be noted that Wedra and De Tore were convicted of murder and were sentenced to 25 years to life.

GASPARINO, who had been held only as a material witness originally, later became a defendant in a separate indictment, to which he was compelled

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to plead guilty when the Courts below refused to honor the commitments of the District Attorney or to enforce the grant of immunity.

The integrity of the judicial process itself is at stake here.

Point II.

THE PETITIONER WAS DENIED A SPEEDY TRIAL IN VIOLATION OF HIS RIGHTS UNDER SECTIONS 668 AND 8 OF THE CODE OF CRIMINAL PROCEDURE, CRIMINAL PROCEDURE LAW §§30.20, 170.30; AND 210.20; SECTION 12 OF THE CIVIL RIGHTS LAW AND THE SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

On October 27, 1970, the petitioner moved to dismiss the indictment charging him with murder, which had been filed on December 16, 1969. According to the opinion of Judge Burchell, the County Judge who denied the motion, the petitioner was not arraigned on his December 16th indictment until July 30, 1970. On the 31st of August, 1970, the District Attorney placed this case on the ready trial calendar. The trial was finally not scheduled to commence until the 5th day of January, 1971, which was approximately 13 months after the indictment was returned.

It is submitted that there was no reason advanced that contained any cogency for delay during the last five months that this case appeared on the ready trial calendar before being called for

trial. Why was arraignment held up for eight months? GASPARINO, in the meantime, had languished in jail. It is the position of the petitioner that this unjustified and unexplained delay violated GASPARINO's rights under the Sixth and Fourteenth Amendments of the United States Constitution, and in violation of Section 12 of the Civil Rights Law and Sections 8 and 668 of the Code of Criminal Procedure.

The District Attorney's office was dilatory in another recent case, namely People v. Minicone, 28 N.Y.2d 279, cert. denied ___ U.S. ___. The Court of Appeals dismissed the indictment in that case.

Accord: People v. Winfrey, 20 N.Y.2d 138, 141. See also, Dickey v. Florida, 398 U.S. 30.

It is submitted that the recent cases of United States v. Marion, 404 U.S. 307 and Baker v. Wingo, 407 U.S. 514 (1972), do not alter the rule in New York requiring speedy trials. As a matter of fact, the latter two cases recognize that a balancing of interests is necessary in Federal practice to determine whether a speedy trial has been denied.

People v. Minicone, supra, and the recent rules for speedy trial promulgated in New York, leave no doubt that an unexplained delay of the type herein involved was prejudicial. The issue herein was preserved and the fact that a plea of guilty was interposed does not change the fact that the Court lost jurisdiction over the case by virtue of this delay.

This, therefore, is another reason for reversal and dismissal of the indictment herein.

In 1844, an English Judge dealing with a problem similar to that presented herein, opined very aptly (Regina v. Robbins, 1 Cox C.C. 114):

> "I ought not to allow the case to go further. It is monstrous to put a man on on his trial after such a lapse of time. How can he account for his conduct so far back?. . . [I]f the charge be not preferred for a year or more, how can he clear himself? No man's life would be safe is such a prosecution were permitted. It would be very unjust to put him on trial." (Emphasis supplied.)

See,

> 5 Stan. L. Rev. 95, 104, 1952 "Justice Overdue — Speedy Trial for the Pre-Trial Defendant."

Moreover, there is no way a suspect can compel or insist that the Government commence a prosecution; nor can a defendant determine when or if the Government may decide to prosecute. The "Sword of Damocles" may hang for the whole period of limitations!

In Pollard v. United States, 352 U.S. 354, 361-362 (1957), the Supreme Court not only equated "purposeful" delays with the "oppressive" ones forbidden by the Sixth Amendment, but also interpreted United States v. Provoo, 350 U.S. 857

(1955), affirming Petition of Provoo, D. Md., 17 F.R.D. 183 (1955), as condemning delay "caused by the deliberate act of the Government."

It is apparent from Pollard v. United States, supra, at 352 U.S. at 361, that the Supreme Court indicates that even an indictment within the limitation period may come too late to square with the Sixth Amendment. (See Mann v. United States, supra, 304 F.2d at 396-397, n. 4; Taylor v. United States, 238 F.2d 259 [D.C. Cir. 1956]; Nickens v. United States, 323 F.2d 807 [D.C. Cir. 1963]; United States v. Provoo, supra.) See 18 U.S.C. §3282.

In Godfrey v. United States, 358 F.2d 850, 852 (D.C. Cir., 1966), the Court of Appeals observed:

> "We note that although the total lapse of time from offense to arrest was about four months, two months of that period was not protected, in terms of reasonableness, by any purpose to advance the public interest in effective law enforcement. The District Court appears to have been of the view that, where delay to serve the purpose of the public occurs, with inevitable impact upon the interests of the accused, there is an obligation on the police to be as diligent as possible in making the arrest, to the end that the accused may know as soon as possible of the charge against him. We agree. The disadvantage to the accused inherent in the deliberate preference accorded

> the public interest in the one period should not be compounded by a failure to exercise appropriate diligence in the other."

In United States v. Godfrey, 243 F. Supp. 830, 831 (U.S.D.C., D.C. 1966), the District Court received the case on a remand from the United States Court of Appeals for the District of Columbia, for the purpose of determining,

> "The reasonableness vel non of the delay occurring between the dates of the alleged offense by appellant, the filing of the complaint, and the issuance of the arrest warrant, and the appellant's arrest, and the effect, if any, on the defense of the case . . . ."

See also Ross v. United States, 349 F.2d 210 (D.C. Cir. 1965). In Ross, the Court of Appeals (249 F.2d at 211) proclaimed:

> ". . . We think a record of this kind more accurately may be deemed as presenting a question akin to a Fifth Amendment due process issue, centering around Appellant's ability to defend himself."

See People v. Winfrey, supra.

In Ross, the Court observed that a delay between the commission of the offense and the prosecution of a protracted nature might well constitute a denial of due process of law. It should be noted that in Ross v. United States, supra, the Court was not merely articulating its

supervisory power over district courts in Washington, D.C.

In Baker v. Wingo, supra, this Court affirmed but held that a defendant's Constitutional right to speedy trial cannot be established by any inflexible rule but can be determined only on an ad hoc balancing basis, in which the conduct of the prosecution and of the defendant are weighed. The Court should assess such factors as the length of and the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant.

It is submitted that in the case at bar the prosecution virtually conceded that it had no specific reason for the delay except that perhaps it was remiss in bringing it before the Grand Jury.

We do not believe that Marion can be read as permitting an arbitrary delay by the prosecution in violation of the Fifth and Sixth Amendments.

We ask the Court rhetorically, of course, whether it would agree that a persons' memory of past events is likely to be more accurate several months after the event or five years after the event? We of course believe the answer is obvious and, therefore, submit that this fact in itself warrants a conclusion that prejudice occurred in this case.

It is difficult to pinpoint actual "prejudice" because events may have occurred which were forgotten or which were not given significance

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owing to the ignorance on the part of the petitioner that an indictment would eventually be sought. As was stated in the brief below in this case, the delay is even more virulent where a defendant is unaware that charges are pending than where he is aware of those charges. In the former case, he has no reason to preserve papers or keep in touch with persons who may be of help and, in general, lapses into a feeling of complacency. In the latter situation, at least the defendant is aware of the charges and can make efforts to preserve his records, keep in touch with possible witnesses and prepare to defend himself eventually.

We would ask the Court to consider the recent case of United States v. Vuitch, 402 U.S. 61, where the Supreme Court indicated that the Government must carry the burden of proof in all cases. Even where there may be an affirmative defense, the Government must disprove its existence.

In essence, the ruling of the Court below means that despite the fact that a defendant raises the issue of speedy trial under the Constitution, the burden rests upon the defendant to prove that the Government denied him a speedy trial to his prejudice and it is not enough that he prove that speedy justice was simply denied.

In other words, although in the case at bar there is a classic situation of an unconscionable delay without justification in bringing a case to trial, the Court below reasons that because the petitioner failed to prove he was actually prejudiced, that no violation has occurred.

We would ask what is the significance of the Fifth and Sixth Amendments if this is the way the speedy trial provision is to be interpreted! What the Marion case has accomplished is an actual repeal of the Sixth Amendment right to speedy trial without the necessity of going through the elaborate procedures necessary to amend or change the Constitution.

We would also respectfully point out that placing the burden of proof of denial of speedy justice with prejudice upon the defendant, may violate the self-incrimination clause of the Fifth Amendment since such proof oft-times can be adduced only through the testimony of the defendant and where a defendant elects not to testify under the Fifth Amendment, he may find himself in the dilemma of having to waive his Sixth Amendment rights. No person accused of a crime should be placed in such a predicament.

We ask this Court to determine whether or not a speedy trial was denied in the Constitutional sense.

The recent rulings of this court in United States v. Marion and Baker v. Wingo, supra, have left the Bench and Bar in a state of confusion to some extent as to what was intended with respect to speedy justice.

The law of New York is clear that the trial should have been commenced at the term next following the return of the indictment but, of course, this was not done. A motion to dismiss had been

made but, without sufficient cause shown by the prosecutor for the delay, the Court nevertheless denied the motion. It is submitted this question also rises to Constitutional dimension and we would ask this Court to grant certiorari and reverse on this basis as well (Criminal Procedure Law §§30.20; 170-30 and 210-20).

Conclusion

Certiorari should be granted and the conviction reversed.

Respectfully submitted,

s/ Irving Anolik
IRVING ANOLIK
Attorney for Petitioner

Order on Appeal from Judgment of Conviction

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on October 24, 1972

HON. SAMUEL RABIN, Presiding Justice
HON. HENRY J. LATHAM
HON. J. IRWIN SHAPIRO
HON. MARCUS G. CHRIST
HON. ARTHUR D. BRENNAN
Associate Justices

A-13-71

- -x

The People of the State of New York,

Respondent,

1010-69

v.

Nicholas Gasparino,

Appellant.

- -x

In the above entitled action, the above named Nicholas Gasparino, defendant in this action, having appealed to this court from a judgment of the County Court, Westchester County, rendered February 16, 1971; and the said appeal having been submitted by Irving Anolik, Esq., of counsel for the appellant, and by B. Anthony Morosco, Esq.,

of counsel for the respondent, and due deliberation having been had thereon; and upon this court's decision slip heretofore filed and made a part hereof, it is:

ORDERED that the judgment appealed from is hereby unanimously affirmed.

Enter:

IRVING N. SELKIN

Clerk of the Appellate Division

Certificate Denying Leave

STATE OF NEW YORK

COURT OF APPEALS

BEFORE: HON. CHARLES D. BREITEL,
Associate Judge

[Same Title]

I, CHARLES D. BREITEL, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that, upon application timely made by the above-named appellant for a certificate pursuant to CPL 460.20 and upon the record and proceedings herein,* there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied.

Dated: New York, New York
November 21, 1972

s/ Charles D. Breitel
Associate Judge

*Irving Anolik, Esq.
225 Broadway
New York, New York 10007

**Hon. Carl A. Vergari
District Attorney, Westchester County
Court House
White Plains, New York

Certificate Denying Leave

Clerk, Court of Appeals
*Briefs returned at office
and Appendix

**Brief returned at office

*Description of Order:

10-26-72 App. Div. 2d affmd. 2-16-71 Westchester Co. Ct.

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FILED
APR 4 1973
MICHAEL RODAK, JR., CLERK

Supreme Court of the United States

OCTOBER TERM 1972

No. 72-1140

NICHOLAS GASPARINO,
Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

CARL A. VERGARI
District Attorney of Westchester County
Office and Post Office Address
County Courthouse
White Plains, New York 10601

914-761-1144

By: B. ANTHONY MOROSCO
Administrative Assistant
District Attorney

JAMES M. ROSE
Assistant District Attorney

CARL F. LODES
Assistant District Attorney
Of Counsel

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Supreme Court of the United States

OCTOBER TERM 1972

No. 72-1140

NICHOLAS GASPARINO,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

Questions Presented

1. Was the conviction of the petitioner, upon his plea of guilty of conspiracy to commit murder a violation of his constitutional right against self-incrimination when no admissions procured from him as a result of any promise by or negotiations with the prosecutor were used against him at any stage in the proceedings, merely because he had previously been promised by the prosecutor that he would not be prosecuted if he cooperated in full in the prosecution against the actual killer, but, after initially cooperating, the petitioner refused to testify against the killer at trial without giving any reasonable explanation?

2. Was the petitioner denied a speedy trial where approximately one year elapsed between his indictment and trial, during which the greater portion of time was taken

up by the petitioner's motion practice and during a significant part of which period his attorney was unavailable due to other commitments?

3. May the petitioner raise the issues of self-incrimination and speedy trial upon subsequent review after he had clearly waived those issues at the time of entering a reduced plea?

The Record Below

The District Attorney has requested the county clerk of Westchester County to certify to this court the printed appendix and cross-appendix in the Apellate Division, Supreme Court, Second Judicial Department which constituted the record upon which the appeal was determined in that court.

Statutes

New York Code of Criminal Procedure

§ 619-c. *Witnesses' immunity.* 1. In any investigation or proceeding where, by express provision of section six hundred nineteen-d of this chapter or any other statute, a competent authority is authorized to confer immunity, if a person refuses to answer a question or produce evidence of any other kind on the ground that he may be incriminated thereby, and, notwithstanding such refusal, an order is made by such competent authority that such person answer the question or produce the evidence, such person shall comply with the order. If such person complies with the order, and if, but for this section, he would have been privileged to withhold the answer given or the evidence produced by him, then immunity shall be conferred upon him, as provided for herein.

2. "Immunity" as used in this section means that such person shall not be prosecuted or subjected to any penalty

or forfeiture for or on account of any transaction, matter or thing concerning which, in accordance with the order by competent authority, he gave answer or produced evidence, and that no such answer given or evidence produced shall be received against him upon any criminal proceeding. But he may nevertheless be prosecuted or subjected to penalty or forfeiture for any perjury or contempt committed in answering, or failing to answer, or in producing or failing to produce evidence, in accordance with the order, and any such answer given or evidence produced shall be admissible against him upon any criminal proceeding concerning such perjury or contempt.

3. "Competent authority" as used in this section means:

(a) The court or magistrate before whom a person is called to answer questions or produce evidence in a criminal proceeding other than a proceeding before a grand jury, when such court or magistrate is expressly requested by the prosecuting attorney to order such person to give answer or produce evidence; or

(b) The court before whom a person is called to answer questions or produce evidence in a civil proceeding to which the state or a political subdivision thereof, or a department or agency of the state or of such political subdivision, or an officer of any of them in his official capacity, is a party, when such court is expressly requested by the attorney-general of the state of New York to order such person to give answer or produce evidence; or

(c) The grand jury before which a person is called to answer questions or produce evidence, when such grand jury is expressly requested by the prosecuting attorney to order such person to give answer or produce evidence; or

(d) A legislative committee or temporary state commission before which a person is called to answer questions

or produce evidence in an inquiry or investigation, upon twenty-four hours prior written notice to the attorney-general of the state of New York and to the appropriate district attorney having an official interest therein; provided that a majority of the full membership of such committee or commission concur therein; or

(e) The head of a state department or other state agency, a commissioner, deputy or other officer before whom a person is called to answer questions in an inquiry or investigation, upon twenty-four hours prior written notice to the attorney-general of the state of New York and to the appropriate district attorney having an official interest therein.

Provided, however, that no such authority shall be deemed a competent authority within the meaning of this section unless expressly authorized by statute to confer immunity.

4. Immunity shall not be conferred upon any person except in accordance with the provisions of this section.

5. If, after compliance with the provisions of this section, or any other similar provision of law, a person is ordered to answer a question or produce evidence of any other kind and complies with such order, and it is thereafter determined that the appropriate district attorney having an official interest therein was not notified, such failure or neglect shall not deprive such person of any immunity, otherwise properly conferred upon him.

§ 619-d. Criminal proceedings in which immunity may be conferred; underlying penal law offenses and competent authorities.

1. In any criminal proceeding before any court, magistrate or grand jury, relating to any of the offenses specified in subdivision two of this section, such court, magistrate

or grand jury may confer immunity in accordance with the provisions of section six hundred nineteen-c.

2. The "offenses" referred to in subdivision one of this section are those defined in the following provisions of the penal law:

(a) Subdivision two of section 125.15;

(b) Subdivision three of section 125.20;

(c) Sections 125.40, 125.45, 125.50, 125.55 and 125.60;

(d) Sections 240.05, 240.10 and 240.15;

(e) Sections 180.15, 180.25, 180.40 and 180.45;

(f) All sections contained in article 200 which define offenses;

(g) Sections 215.00, 215.05, 215.15, 215.20, 215.25 and 215.30;

(h) Sections 105.00, 105.05, 105.10 and 105.15;

(i) Sections 225.05, 225.10, 225.15, and 225.20 and 225.30;

(j) Sections 135.20 and 135.25;

(k) Sections 220.10, 220.15, 220.20, 220.30, 220.35 and 220.40;

(l) Sections 190.40 and 190.45.

§ 619-e. Waiver of immunity. If it be provided by section six hundred nineteen-c or any other general or special law that a person shall not be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he may testify or produce evidence, documentary or otherwise, or that testimony so given or produced shall not be received against him upon any criminal investigation, prosecution or proceeding, such person may execute, acknowledge and file in the office of the county clerk a statement expressly

waiving such immunity or privilege in respect to any transaction, matter or thing specified in such statement and thereupon the testimony of such person or such evidence in relation to such transaction, matter or thing may be received or produced before any judge or justice, court, tribunal, grand jury or otherwise, and if so received or produced such person shall not be entitled to any immunity or privilege on account of any testimony he may so give or evidence so produced.

New York Penal Law Section 2447

§ 2447. *Witnesses' immunity.*

1. In any investigation or proceeding where, by express provision of statute, a competent authority is authorized to confer immunity, if a person refuses to answer a question or produce evidence of any other kind on the ground that he may be incriminated thereby, and, notwithstanding such refusal, an order is made by such competent authority that such person answer the question or produce the evidence, such person shall comply with the order. If such person complies with the order, and if, but for this section, he would have been privileged to withhold the answer given or the evidence produced by him, then immunity shall be conferred upon him, as provided for herein.

2. "Immunity" as used in this section means that such person shall not be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which, in accordance with the order by competent authority, he gave answer or produced evidence, and that no such answer given or evidence produced shall be received against him upon any criminal proceeding. But he may nevertheless be prosecuted or subjected to penalty or forfeiture for any perjury or contempt committed in answering, or failing to answer, or in producing or failing to produce evidence, in accordance

with the order, and any such answer given or evidence produced shall be admissible against him upon any criminal proceeding concerning such perjury or contempt.

3. "Competent authority" as used in this section means:

(a) The court or magistrate before whom a person is called to answer questions or produce evidence in a criminal proceeding other than a proceeding before a grand jury, when such court or magistrate is expressly requested by the prosecuting attorney to order such person to give answer or produce evidence; or

(b) The court before whom a person is called to answer questions or produce evidence in a civil proceeding to which the state or a political subdivision thereof, or a department or agency of the state or of such political subdivision, or an officer of any of them in his official capacity, is a party, when such court is expressly requested by the attorney-general of the state of New York to order such person to give answer or produce evidence; or

(c) The grand jury before which a person is called to answer questions or produce evidence, when such grand jury is expressly requested by the prosecuting attorney to order such person to give answer or produce evidence; or

(d) A legislative committee or temporary state commission before which a person is called to answer questions or produce evidence in an inquiry or investigation, upon twenty-four hours prior written notice to the attorney-general of the state of New York and to the appropriate district attorney having an official interest therein; provided that a majority of the full membership of such committee or commission concur therein; or

(e) The head of a state department or other state agency, a commissioner, deputy or other officer before whom a person is called to answer questions in an inquiry

or investigation, upon twenty-four hours prior written notice to the attorney-general of the state of New York and to the appropriate district attorney having an official interest therein.

Provided, however, that no such authority shall be deemed a competent authority within the meaning of this section unless expressly authorized by statute to confer immunity.

4. Immunity shall not be conferred upon any person except in accordance with the provisions of this section.

5. If, after compliance with the provisions of this section, or any other similar provision of law, a person is ordered to answer a question or produce evidence of any other kind and complies with such order, and it is thereafter determined that the appropriate district attorney having an official interest therein was not notified, such failure or neglect shall not deprive such person of any immunity otherwise properly conferred upon him.

New York State Constitution Article 1, Section 6

§ 6. [*Grand jury; right to counsel; informing accused; double jeopardy; self-incrimination; waiver of immunity by public officers; due process of law*]

No person shall be held to answer for a capital or otherwise infamous crime (except in cases of impeachment, and in cases of militia when in actual service, and the land, air and naval forces in time of war, or which this state may keep with the consent of congress in time of peace, and in cases of petit larceny, under the regulation of the legislature), unless on indictment of a grand jury, and in any trial in any court whatever the party accused shall be allowed to appear and defend in person and with counsel as in civil actions and shall be informed of the nature and cause of the accusation and be confronted with the wit-

nesses against him. No person shall be subject to be twice put in jeopardy for the same offense; nor shall he be compelled in any criminal case to be a witness against himself, providing, that any public officer who, upon being called before a grand jury to testify concerning the conduct of his present office or of any public office held by him within five years prior to such grand jury call to testify, or the performance of his official duties in any such present or prior offices, refuses to sign a waiver of immunity against subsequent criminal prosecution, or to answer any relevant question concerning such matters before such grand jury, shall by virtue of such refusal, be disqualified from holding any other public office or public employment for a period of five years from the date of such refusal to sign a waiver of immunity against subsequent prosecution, or to answer any relevant questions concerning such matters before such grand jury, and shall be removed from his present office by the appropriate authority or shall forfeit his present office at the suit of the attorney-general.

The power of grand juries to inquire into the wilful misconduct in office of public officers, and to find indictments or to direct the filing of informations in connection with such inquiries, shall never be suspended or impaired by law.

No person shall be deprived of life, liberty or property without due process of law.

Facts

One John DeTore made arrangements with Nicholas Gasparino for the said Nicholas Gasparino to procure the murder of his, DeTore's wife, and Gasparino thereafter employed one Kenneth Wedra for that purpose, who subsequently did in fact kill DeTore's wife. DeTore and Wedra never met each other and DeTore did not know Wedra's identity. DeTore and Wedra have subsequently

been convicted in the Westchester County Court of murder and that conviction has been affirmed on appeal by the Supreme Court of New York, Appellate Division, Second Department.

In the course of the initial investigation of the homicide, DeTore gave a statement implicating the defendant here, Nicholas Gasparino, and permitted the police to overhear telephone conversations that he had with Gasparino which were of an incriminating nature and which were offered in evidence at the aforesaid trial of DeTore and Wedra. Thereafter, when Gasparino was picked up and questioned, a promise was made to him and to his attorney, Vincent Lanna, that nothing that he said would be used against him and that if he cooperated fully he would not be prosecuted for murder. It was the full intent of the parties although not specifically articulated that this cooperation would include testimony not only in the Grand Jury but at trial. Gasparino did testify before the Westchester Grand Jury on December 17, 1968 and as a result thereof and of other evidence the Grand Jury indicted Wedra and DeTore. There was no agreement to confer statutory or transactional immunity upon Gasparino in return for his testimony in the Grand Jury. Gasparino, in conformity with the District Attorney's promise not to use anything that he said against him, was intentionally given testimonial immunity by operation of law by summoning him before the Grand Jury without having obtained a fully executed waiver of immunity. The entirety of Nicholas Gasparino's testimony on that occasion was handed up for inspection of the court in-camera. It appears that on page 53 when the first substantive question was asked of Gasparino he answered it by saying, "Yes Sir," and then interjected the following:

> "Excuse me. For a minute, may I say something? Mr. Lanna advised me that immunity should be said before

I should say anything. I don't know what he means by that."

In response the prosecutor said, "Well, you have been promised immunity by the day." The answer to that was "Yes". This may have meant immunity on a day-by-day basis or that the stenographer misinterpreted the statement, "You have been promised immunity by the D.A.," which is more probable. In either case, this language clearly did not confer statutory immunity, and in fact represented the true situation with respect to the agreement. Indeed, had the agreement been complied with by the witness, the District Attorney's office would have kept its *promise* not to prosecute despite the fact that the witness did not obtain transactional immunity, nor could he have lawfully done so, under state law.

It is absolutely important to note at this point that in the subsequent Grand Jury proceedings before another Grand Jury where Gasparino was in fact indicted *none of his testimony* before the Grand Jury *or other admissions* procured as a result of the District Attorney's promise *were used against him.* At the time that the District Attorney first made his offer to Gasparino as well as at the time of the presentation of the *DeTore-Wedra* case to the Grand Jury, the District Attorney already had a completely adequate case against Gasparino for the crime of murder. It was this evidence only that was presented to the second Grand Jury which indicted Gasparino for murder. But back to the narration.

The record indicates (See Affidavit of Warren Schneider at C-44), that it was not the prosecutor's intent to seek or confer statutory immunity; indeed, he would have been quite foolish to do this because unless he was in a procedural posititon to insure Gasparino's testimony at trial, obtaining an indictment against Wedra would have been fruitless. As a matter of prosecutorial judgment it would

have been much better to have proceeded with an indictment against Gasparino and convict him of murder than to permit Gasparino to go free in order to secure an indictment against Wedra which had no reasonable assurance of being successfully prosecuted. At the trial of Wedra and DeTore, the witness Gasparino nefariously and for the first time (an examination of the record in that case will indicate that there may well have been an intentional attempt to mouse trap the prosecutor), refused to testify against Wedra and DeTore. The defendant Wedra was only convicted because of the fortuitous and unexpected discovery of additional evidence and but for that discovery the absence of Gasparino's testimony at trial would have been fatal to the People's case.

What happened here was that although the District Attorney was at all times willing to comply with an unprecedented promise to Gasparino in order to secure a just result with respect to the actual trigger man, i.e., Wedra, at the last minute, the petitioner Gasparino nefariously and unconscionably chose to abandon his commitment, not upon any claim that his prior testimony was false, but rather simply for the clear and obvious purpose of frustrating the prosecution upon the mistaken belief that he had immunity. To make it perfectly clear to Gasparino and perfectly fair to him, he was interviewed, with a stenographer and his attorney present, immediately before being called to the witness stand in the Wedra and DeTore case and fully advised that the position of the District Attorney's office was that he had no transactional immunity, and that if he refused to testify in the Wedra and DeTore case, it was the intention of the District Attorney to seek an indictment and prosecute him for murder. The transcript of that interview is included in the cross-appendix (Transcript of Proceedings in District Attorney's Office at C-14). Nevertheless, Gasparino refused to testify, asserting his right against self-incrimination as a justification therefor,

despite the fact that if he indeed did have statutory immunity he certainly had no right against self-incrimination. Subsequent to his refusal to testify, the defendant Gasparino was indicted by the Grand Jury for murder (See Indictment, at A-24).

After the defendant had unsuccessfully moved to dismiss the indictment in the trial court on the grounds if immunity and after an unsuccessful habeas corpus proceeding, the defendant proceeded in the Appellate Division by Article 78 Proceeding, for a writ of prohibition against the prosecution on the grounds that he had transactional immunity. The records of that proceeding are contained in the appendix and cross-appendix (See Motion to Dismiss at C-1 and Writ of Prohibition at A-5 through A-8). The Appellate Division denied that petition on the merits specifically denying as academic the District Attorney's motion to dismiss the proceeding on procedural grounds unrelated to the merits (See Order of Appellate Division Denying Relief at C-64). The defendant-appellant did not seek further review by the N. Y. Court of Appeals of that determination. He thereafter moved for dismissal on speedy trial grounds and when that motion was denied (See A-47), on the day set for the commencement of a hearing and trial, the defendant entered the plea of guilty to the reduced crime of Conspiracy in the First Degree, a crime which he specifically requested to be permitted to plead guilty to rather than the initial offer of Manslaughter, Second Degree (See proceedings at A-14). Before recommending acceptance of the plea and as a condition precedent thereto, the District Attorney required the defendant and the defendant agreed to waive all issues previously litigated specifically including the issues of immunity and speedy trial (See Proceedings A-17 through A-18). Upon that condition the District Attorney recommended acceptance of the plea in the interest of justice, it was accepted by the Court, and the defendant was subsequently sen-

tenced to a term not to exceed 15 years (See Proceedings at A-5). Thereafter, the defendant appealed that conviction to the Appellate Division (See Notice of Appeal at A-3), but the People did not object to the appeal or seek to have it dismissed in any way as it had not been their intention nor was it part of the plea agreement that the defendant would be deprived of his right to appeal and his right to seek review of any issue which had not been waived (including, principally any claim he might have with respect to the excessiveness of sentence). Nevertheless, upon this appeal the only issues that have in fact been raised and asserted by the defendant are those issues which were waived at the time of the plea. The Appellate Division affirmed the conviction and the N. Y. Court of Appeals denied leave to appeal.

It is respectfully submitted that even if one's frame of reference be limited to those criminal cases which appear before this Court each year, nevertheless, it may be said that the repeated history of bad faith and double dealing practiced by the defendant Gasparino in this case has scarcely any comparison. The facts upon this record indicate clearly that the defendant Gasparino arranged for a murder which in fact was committed; to relieve himself of criminal liability he agreed to be a witness against the trigger man; after commencing upon this project and before that agreement had been completed by testimony at trial, he nefariously backed out of his agreement and sought to frustrate the objects of justice in that case; he thereafter was indicted here and after an opportunity to litigate his principal issue in an appellate court had resulted in an unfavorable determination, he nevertheless was given consideration by the entry of a reduced plea upon the reasonable condition that the litigation of that issue should there be terminated and that the issue of immunity as well as the speedy trial issue be waived; having agreed to this in order to obtain a substantial benefit (because a sentence of 15 years is substantially less than the maximum liability

for murder, and a conviction in this case was a virtual certainty) he thereafter, true to form, seeks again to avoid the commitment which he originally sought to enter into for his own benefit. And now, he seeks to claim here that the proceedings leading to his conviction and sentence have been unfair *to him!*

Factual Inaccuracies in Petition for Certiorari

Unfortunately, for the sake of clarity it appears necessary to point out several factual inaccuracies in the petitioner's petition for certiorari. On page 2 of the petition petitioner asserts that under New York Law the immunity conferred was necessarily transactional and not merely testimonial. Had the New York courts found that the defendant had received transactional immunity they would have been compelled to dismiss the indictment. It is respectfully submitted that it was perfectly clear that the holding of the state courts on that question of state law was that petitioner did not receive transactional immunity or at best had waived the issue and did not preserve it for appeal.

Of course, the respondent's disagreements with the petitioner about the statement of the questions presented does not itself constitute a factual disagreement. It may be pointed out, however, with respect to petitioner's question No. 5 in his petition that there was heretofore no claim interposed with respect to intimidation based on previous holding of petitioner as a material witness.

On page 5 of the petition it is alleged that the petitioner was pressured into pleading guilty because of the full statements given by petitioner during his grand jury testimony against his co-defendants. All parties to this proceeding were fully aware that the District Attorney recognized that those statements could not be used in evidence against the defendant in his own trial. There was

no intimation that they could be used nor any belief on the part of trial counsel that there was any danger of their being used.

On Page 9 the petitioner recites that there was a stipulation not to prosecute irrespective of anything else. It is submitted that the record clearly indicates that the promise not to prosecute was predicated upon the full cooperation of defendant. Trial counsel for the defendant admitted orally to the writer and it is set forth and uncontroverted in the record below that he understood at the time of the agreement that part of the agreement was that the petitioner would testify not only in the grand jury but at trial.

It is stated on page 11 that misrepresentations of the District Attorney lulled the petitioner and his counsel into a false sense of security. There were no misrepresentations by the District Attorney, none are indicated in the record, and indeed before the petitioner made his final decision not to testify at trial out of a sense of fairness he was advised by the writer in the presence of his counsel with a stenographer present that it was the position of the District Attorney that he did not have transactional immunity and that if he refused to testify at trial he would be indicted and prosecuted for murder.

Of course, the respondent disagrees with the other assertions made in the petition but these are more a matter of argumentation.

Summary of Argument

In summary, the arguments of the respondent set forth below are as follows:

1. The defendant waived the issues here raised at the time of his plea of guilty. He had an opportunity to litigate these issues (speedy trial and self-incrimination) pre-

viously and the decisions had gone against him. In order to secure a compromised disposition of the case he agreed to waive those issues in the most expressed and explicit terms after full consultation with counsel. It is respectfully submitted that in view of that knowing and intelligent waiver he cannot now raise them.

2. The defendant was not deprived of a speedy trial. The period of approximately one year from his indictment to his conviction was consumed for the most part by his own motion practice. Further, his attorney's other commitments made him unavailable for trial at the time the motion practice had been concluded and the case was ready for trial. When the final motion was decided only 45 days expired before the case was actually reached for trial, at which time the defendant entered his plea of guilty.

3. No substantial federal issue is involved with respect to the question of immunity and self-incrimination. The petitioner's immunity arguments are arguments of state law which have been decided against him in the state courts. He has no federal constitutional issue with respect to self-incrimination because he was not punished for contempt for any refusal to testify and his conviction for a substantive offense was not based upon any admission that he had made as a result of any negotiations or agreement whatever with the District Attorney, all such evidence being carefully excluded from presentation before the grand jury which indicted him. No such evidence was used against him subsequently because the conviction was by plea. The question of whether the defendant had transactional immunity under New York State statutes is a matter of state law not properly before this court and was decided adversely to the defendant in the state courts.

4. The defendant in fact did not receive transactional immunity under state law nor was any unfairness involved

in his failure to receive it. The intent of the parties and intent of the agreement was perfectly clear—the defendant would not be prosecuted if he cooperated fully and this cooperation included his testimony against his accomplices at their trial. He refused to testify against the accomplices at trial and accordingly failed to fulfill his part of the agreement. Thereafter he was properly indicted and convicted, although no evidence that he had given pursuant to the agreement to the grand jury which indicted his accomplices was ever used against him. The District Attorney acted in complete good faith as is evidenced by the fact that another participant, represented by the same attorney, who was the subject of the same agreement, and who fulfilled it, has never been prosecuted and is at large. All of the bad faith in this case was on the part of the defendant.

POINT I

The defendant at the time of plea waived the issues of speedy trial and immunity and cannot raise them now.

At the time of the defendant's plea in the clearest and most unequivocal terms he waived the issues of immunity and speedy trial. See A-15-20. To permit him to raise them at this time "would constitute a mockery of the orderly administration of justice". Compare *People* v. *Costanza,* 37 A.D. 2d 729, 303 NYS 2d 925 (2d Dep't 1971). This defendant, whose total history of litigation and participation in litigation arising out of the killing of Mrs. Dorothy DeTore has been one of constant nefarious double dealing, again has acted contrary to the clear understanding which resulted in the District Attorney's consent to a reduced plea by seeking to raise upon this appeal those issues previously litigated and waived at the time of his reduced plea. The defendant was charged with murder. He received rather lenient treatment from the

District Attorney when he was permitted, subject to the approval of the Court, to enter a reduced plea to conspiracy to commit murder as a Class C felony, upon condition that the issues previously litigated, including immunity and speedy trial would be waived. It does no good to argue as counsel does that the prospect of liability for a murder conviction was un unfair coercion leading to the plea and the waiver. The plea and the waiver were part of one whole. This was not a case where a District Attorney was motivated to consent to a plea out of administrative necessity or because of a weak case. The record here and in the case of *People* v. *DeTore and Wedra*, 39 AD 2d 839, 333 NYS 2d 374 indicates that the District Attorney always had the ability to convict the defendant Gasparino of murder with relative ease. Despite his nefarious previous conduct Gasparino was permitted to enter a reduced plea principally because of the fact that he had slightly less culpability than the other two murderers. (And in view of the fact that the District Attorney had at one time offered him freedom from prosecution if he cooperated fully and was not here motivated by revenge, but merely by justice).

When a defendant enters a reduced plea to avoid liability for greater sentence he is not unconstitutionally coerced. See e.g., *North Carolina* v. *Alford*, 400 U.S. 25 (1970); *Brady* v. *United States*, 397 U.S. 742 (1970); *Parker* v. *North Carolina*, 397 U.S. 390 (1970). The District Attorney has an absolute right to refuse to consent to a reduced plea and it is submitted that requiring a waiver of these two issues as a condition precedent to that consent was not an unreasonable exercise of his office; the defendant received the better part of the bargain. Now, when the prosecution is stale, he seeks a vacation of the plea and a new trial.

POINT II

The defendant was not deprived of a speedy trial.

Even if this issue were available upon review, (which it is respectfully submitted it is not), nevertheless, the record and in particular the facts recited in the affidavit in opposition to the motion (C-58-63), clearly indicate that there was no deprivation of a right to a speedy trial. The total time between the filing of the indictment and the plea of guilty was about one year. The arraignment was scheduled for three days after the filing of the indictment and adjourned for ten days at the defendant's request and for an eleventh day on consent. The pleading was further adjourned because of a motion made by the defendant. During the course of that motion the People were granted a reasonable adjournment of two weeks to obtain vitally necessary transcripts from the trial of *Wedra* and *DeTore* and to file the reply affidavit. The pleading thereafter was adjourned from time to time to await a decision on the motion. The motion to dismiss upon the grounds of immunity was denied on February 26, 1970. At that point it is submitted that the only delay chargeable to the People was the three days between the filing of the indictment and the initial scheduled arraignment. Compare CPL § 30.30. The defendant during February and early March also litigated a writ of habeas corpus and subsequently appealed it to the Appellate Division and sought to appeal it to the N.Y. Court of Appeals. After the decision on the motion to dismiss in the trial court, the defendant commenced an Article 78 Proceeding in the Appellate Division upon the same issue. The order denying relief on that application dated May 15, 1970 was received by the District Attorney on June 22, 1970 at which time 29 days had elapsed which could not clearly be charged to the defendant (even if one excludes the time consumed by the habeas corpus). On July 30, 1970,

the defendant was arraigned and entered a plea of not guilty. The People at that time were ready for trial and if the record was not so marked, it was simply because CPL § 30.30 was not then in effect. This was 67 days after the filing of the first accusatory instrument. The defendant received thirty days to make motions. On August 31, 1970, the case was marked ready for trial. At that time two County Court Judges were available for trial. However, on September 24, 1970 a murder trial was started.

On October 10, 1968 one Helen Goodyear had been arraigned on an indictment charging her with Manslaughter. This significantly older bail homicide case was represented by Gasparino's attorney, Vincent Lanna. He indicated that he would be unavailable to try that case before November 9, 1970. On October 27th Mr. Lanna moved to dismiss this case for failure to prosecute (A-50-56). The People's affidavit was filed November 5, 1970 (C-58-60), the matter submitted November 6, 1970, and decision of the County Court made on November 23rd (A-47-48). If Mr. Lanna had been available to try this case instead of the Goodyear case on November 9th, this case was not triable because of the pendency of the motion to dismiss the prosecution. The subsequent delay was between the end of November and the beginning of January, including the period of the Christmas holidays when jurors are normally not called nor sworn. On the day set for trial the defendant entered his reduced plea. It is respectfully submitted that the claim that the defendant was denied a speedy trial is wholly and totally without substance based upon the factual record here. Most of the delay here was caused not even by the absence of available trial parts, but by the defendant's motion practice. Even if there had been twenty county judges in Westchester County to speed along trials (Compare *People* v. *Ganci*, 27 N.Y.2d 418, *cert. den.*, 402 U.S. 924 (1971)), in this case, the trial proceedings could not have been accelerated to any great degree because of the defend-

ant's motion practice. The plea date of January 5th was in fact the date when the case was scheduled to go to trial.

It is respectfully submitted further that the Appellate Division could take judicial notice of the extraordinary number of cases in Westchester County in which Vincent Lanna is the attorney. Now Mr. Lanna is concededly a brilliant advocate, yet his practice in Westchester County, New York City and the Federal Courts make his availability a very tenuous matter. Lanna handles so many cases in Westchester County that he virtually is in a position of interposing delay claims in any case where he proceeds to trial on another of his cases. Certainly Mr. Gasparino was aware of Mr. Lanna's other involvements. Nevertheless, he chose to have him as counsel. It is submitted that even if the delay here were twice as long as it was, it would be an arguable question as to whether the People were culpable in the delay, because if this case had not been brought to trial on January 5, 1971, it surely would not have been because of the People's lack of desire to bring it to trial, but because of counsel's continuing unavailability as a result of his over-committed schedule. While it may not be properly part of the record in this case, the District Attorney will submit to the Court, if it so requests, a complete catalogue and analysis of the cases represented by Mr. Lanna and the scheduling difficulties inherent in this situation. For example at the time of the submission of this appeal in the Appellate Division in mid-1972, out of approximately 107 pre-1972 cases awaiting trial in Westchester County Mr. Lanna was involved in approximately 48.

POINT III

No substantial federal issue is involved upon this petition.

As has been pointed out in Point II, *supra,* the speedy trial issue (which clearly would be a Federal Constitutional issue) is, upon the facts contained in the instant record, wholly without substance.

Furthermore, the issues of immunity and self-incrimination raised here do not involve Federal Constitutional questions. What the petitioner in Point I of his argument in the petition for certiorari does is merely to restate his arguments with respect to the interpretation of state law upon which he was unsuccessful in the state courts. It is respectfully submitted that in a state criminal prosecution the availability of immunity and the classifications of immunity (i.e. testimonial, or transactional) are purely matters of state law. The Federal Constitution creates no immunity in state prosecutions. What it does is prohibit compulsory self-incrimination. Accordingly, immunity type issues are converted from state to federal issues reviewable in this Court where either (1) a defendant has refused to testify claiming his right against self-incrimination and claiming that the immunity offered under state law is not commensurate with his privilege, and is thereafter convicted in the state courts of contempt; or (2) a defendant testifies under circumstances which would violate his right against self-incrimination but for the granting of some type of immunity, and is thereafter convicted based upon admissions thus compelled from him in violation of his federal right against self-incrimination. But, here we have no such federal issue. The defendant Gasparino has not been convicted of a contempt for refusal to testify. When he refused to testify at the Wedra and DeTore trial that refusal was respected and he was not

coerced into testifying. Gasparino was convicted of a substantive offense which had been the subject of his grand jury testimony against Wedra and DeTore. However, no part of the case against Gasparino was based upon his testimony in that other case. The grand jury that indicted him was a different grand jury from the one before which he testified and none of his admissions or the fruit of any admission was used in evidence against him before the grand jury. Further, no admission (or for that matter any other evidence) was subsequently used against him to secure his conviction because his conviction was by plea, and there was no trial at all! Further, upon the plea he waived the issue of immunity thereby acknowledging that for the purpose of subsequent review his rights against self-incrimination had not been violated in the processes leading to his conviction.

None of Gasparino's admissions were ever used against him. Accordingly, there is no issue of self-incrimination. He was not convicted of contempt for refusal to testify and accordingly, there is no Fifth Amendment issue with respect to attempted coercion of testimony. Because use immunity satisfied the Federal Constitution (see e.g. *Zicarelli* v. *New Jersey State Commission of Investigation,* 406 U.S. 472, 32 L.Ed. 2d 234 (1972), and because it has been wholly conceded by the State that Gasparino had use immunity, and that use immunity has been fully respected, there is no federal constitutional issue. The disagreement in this case between the State and the defendant is based upon the additional transactional immunity provided under New York State Law as a matter of legislative grace *under some circumstances.* The State has contended that the circumstances giving rise to transactional immnnity under state law were not here present and the defendant has claimed that they were present. The State courts have decided against the defendant. The defendant now seeks through pure nominalism and verbal equivocation to involve this

court in that controversy with respect to State law, wholly unrelated to the defendant's privilege against self-incrimination which was clearly respected and not violated in this case.

To demonstrate the accuracy of this analysis there is set forth in Point IV below the arguments in response to the defendant's state law arguments with respect to transactional immunity.

POINT IV

The defendant was not protected from conviction by transactional immunity under State Law.

A. The Distinction Between Testimonial And Transactional Immunity Has Been Clearly Recognized in New York.

Prior to the enactment of the CPL (Sept. 1, 1971, subsequent to the events of the instant case) there had arisen in New York two different types of immunity that could result from a Grand Jury appearance. Section 619-c, *et seq.*, of the Code of Criminal Procedure and its statutory predecessor, Penal Law § 2447, provided what has come to be called statutory immunity. Such immunity was granted by an authorized agency only as provided by statute and required first, that the witness refuse to answer pertinent questions and assert his constitutional privilege, and secondly, that the authorized agency exercise discretion in favor of granting such immunity, and thirdly, that as a result thereof a witness be directed to answer and that he, in fact, answer (See *People* v. *Laino*, 10 N.Y.2d 161 (1961); *People* v. *Ianello*, 21 N.Y.2d 418, *cert. den.* 393 U.S. 827 (1968); Code of Criminal Procedure, Section 619-c, *et seq.*). The effect of such immunity was to protect the witness from prosecution for any criminal act which he might reveal during his testimony (See *People* v. *Laino, supra; Gold* v. *Menna*, 25 N.Y.2d 475 (1969)).

Because this protection applies to prosecution for the transaction under any circumstances, it is referred to as transactional immunity. Such statutory transactional immunity could only be given during an investigation of or trial for certain specified offenses although, once conferred, it applied to all crimes, whether or not specified as grounds for granting immunity (See *Gold* v. *Menna, supra*). Murder is not one of the specified crimes but conspiracy is. (See Subpoint B *infra*.) It was pointed out in the People's Affidavit below that the subject Grand Jury was not investigating Conspiracy (See Affidavit of B. Anthony Morosco at C-5). The Grand Jury is an agency authorized to grant such immunity at the request of the prosecuting attorney, but the prosecuting attorney by himself is not (See Code of Criminal Procedure, § 619c).

Constitutional immunity, on the other hand, is an immunity that has been held to attach automatically to a witness before a Grand Jury who is a target of investigation or a potential defendant (See, *People* v. *Steuding*, 6 N.Y. 2d 214 (1959)); unless he affirmatively waives immunity he receives this type of immunity simply by being called to testify before a Grand Jury. This is spoken of as constitutional, because it derives directly from the *State Constitutional right* against self-incrimination (See New York Constitution, Article I, Section 6).

While the *Steuding* case left open the question of whether such immunity was transactional or only testimonial, *People* v. *Laino, supra*, answered that question by holding that state constitutional immunity is testimonial only and that while such immunized testimony may never be used against the defendant and therefore the Grand Jury before which he testified may not indict him, nevertheless he may subsequently be indicted by a different Grand Jury, provided that his testimony before the first Grand Jury is not used against him. Nothing in subsequent decisions by the Court of Appeals has modified this ruling with respect to constitutional immunity.

In *People* v. *La Bello*, 24 N.Y.2d 598 (1969), *cert. den.* 400 U.S. 548 (1971), the Court of Appeals held that the constitutional privilege against self-incrimination did not require the granting of full transactional immunity before a witness could be compelled to give answers and that the Constitution only required testimonial immunity. Accordingly, the grant of testimonial immunity would be a relief commensurate with the privilege. However, the Court went on there to imply that despite the clear language of § 619(d) of the Code of Criminal Procedure, the statutory immunity provided for in New York State was a testimonial immunity only. That second part of the determination in *La Bello* was overruled in *Gold* v. *Menna*, 25 N.Y.2d 475 (169). In *Gold* v. *Menna*, the New York Court of Appeals did not recognize a New York State constitutional privilege against self-incrimination which would require for its satisfaction full transactional immunity, but nevertheless, held that statutory immunity was transactional in nature because it was the intent of the Legislature that it be so; while the Constitution only requires testimonial immunity, in New York State statutory immunity as a matter of legislative grace is transactional in nature. Nothing in *Gold* v. *Menna* disturbs the determination in *La Bello* that the Constitutional privilege only *required* testimonial immunity. That position has been clearly vindicated by the recent determination of this Court in *Zicarelli* v. *New Jersey State Commission of Investigation*, 406 U.S. 472, 32 Ed.L.2d 234 (May 22, 1972). It is perfectly clear thefore, that the Federal Constitutional rule is that testimonial immunity satisfies the Constitutional privilege. In the instant case it is of course the position of the People that immunity provided for under the statute was not given. It is, however, respectfully submitted that since the Constitutional position of the People has been reenforced by the *Zicarelli* case, and insofar as statutory transactional immunity has now clearly been held to be a matter of legislative grace only, there should be no pre-

sumption in favor of that type of immunity arising from proceedings. If there was any confusion here, the parties should be returned to their original position and be made whole, by determining that the immunity that the defendant received was commensurate with his privilege (See Comments by Mr. Lanna at C-17). Immunity commensurate with the privilege is testimonial immunity irrespective of what additional gratuitous immunity may be provided by the Legislature in some circumstances.

B. Statutory Transactional Immunity Was Not Authorized Upon Investigation For The Crime Of Murder.

The posture of the instant case was such that under Section 619-d of the Code of Criminal Procedure the Grand Jury could not have granted transactional immunity even if it desired to do so. *Gold* v. *Menna, supra*, did not change, but rather reasserted the rule in Section 619-d. That case, overruling in part the case of *People* v. *La Bello, supra*, which held that statutory immunity was only testimonial, held that where, in an investigation of a crime *specified in the statute*, a witness, having been granted statutory immunity, testifies to the commission of other unspecified crimes, he is, nevertheless, immunized. The list of crimes in Section 619-d is a list of crimes with respect to which the investigation may be furthered by granting immunity, and it is not a list of the only crimes to which the immunity, once granted, applies. In the *Gold* case, Conspiracy was the subject of the Grand Jury investigation, not only accidentally but primarily, because it was specifically set forth as a subject of the investigation by the order impanelling the jury. Therefore, when the defendant testified to incriminating facts, having been given immunity in the conspiracy investigation, he was immunized from prosecution for Murder. In the instant case, the sole subject of investigation was Murder, and not Conspiracy, and the situation is therefore substantially different. This is clear from the fact that both

the Grand Jury log and calendar contained in the record indicate that only Murder was the subject matter of the investigation.

C. The Grand Jury Did Not Choose To Grant Statutory Immunity.

It is perfectly clear from Section 619-c et seq., that only specifically authorized agencies may grant statutory immunity. The District Attorney has no such authority by himself. Subject to the limitations of Section 619-d, the Grand Jury is an authorized agency to grant statutory immunity, but it is clear from all of the statutes relating to the Grand Jury that, where a decision by the Grand Jury is required on any matter, the decision must be had by vote. It is perfectly clear here that the Grand Jury did not vote to grant any type of immunity, nor was anyone at any time misled into believing that the Grand Jury had so voted.

D. There Was No Agreement To Confer Transactional Immunity Here.

The defendant Gasparino testified before the Grand Jury without executing a waiver of immunity after negotiations to accomplish that testimony. On page 53 of the Grand Jury minutes, the record indicates that after Gasparino answered affirmatively the first substantive question, he then said:

> "Excuse me for a minute, may I say something? Mr. Lanna advised me that immunity should be said before I should say anything. I don't know what he means by that."

The prosecutor said:

> "Well, you have been promised immunity by the day, have you not?"
> (Answer) "Yes".

It may be that this meant immunity on a day-to-day basis or that the stenographer misinterpreted the statement, "You have been promised immunity by the D.A.", which is more probable. In either case, it was clear that the statement referred to the actual state of facts, to wit, and *in futuro* promise by the District Attorney. The Prosecutor went on to assure the witness that this was a matter of record, having been placed on the record before the Grand Jury. The witness proceeded to answer the questions. Thereafter the witness Gasparino refused to testify at the trial of DeTore and Wedra, and, but for the fortuitous and unexpected subsequent discovery of additional evidence, the absence of Gasparino's testimony at trial would have been fatal to the People's case against Wedra. No rational explanation in terms of motivation for the Gasparino refusal has ever been offered, and the conclusion is inescapable that Gasparino nefariously and wrongfully chose simply to attempt to obstruct the prosecution. He certainly had no legitimate fear about the prosecutor's good faith in his promise. Another witness, Di Tomasso received identical assurances from the District Attorney, and the ultimate demonstration of the prosecutor's good faith is that Di Tomasso is at large and not under any charges. Indeed, Mr. Lanna also represented Di Tomasso and permitted him to testify at trial without having clarified with respect to Di Tomasso the type of immunity that he received, at least from Mr. Lanna's point of view. Certainly, we must assume that counsel felt that Di Tomasso was adequately protected, and therefore it is clear that he would not automatically reject an offer of testimonial immunity coupled with a promise not to prosecute, for this is all the People claim that Di Tomasso had received at the point when, without further clarification, Mr. Lanna permitted him to testify at trial.

The record below indicates that Mr. Lanna acknowledged in discussion with the writer that he understood at the time of Gasparino's Grand Jury testimony that it was ex-

pected that he would also testify at trial. Now it is claimed however, that despite this understanding the arrangement included a grant of transactional immunity then, thereby depriving the prosecutor of any effective method of insuring compliance with this understanding. Despite petitioner's protestations to the contrary, it would have been inconceivable for the prosecutor to have chosen not to indict Gasparino, against whom there was clear evidence, in order to obtain an indictment against another person without any reasonable assurance that he could convict that other person. However much the District Attorney wanted to prosecute the trigger man, if a successful prosecution could not be reasonably assured, certainly the District Attorney would have taken the option to prosecute Gasparino. Moreover, it is inconceivable that even if testimonial immunity and a promise not to prosecute were the subject matter of the arrangements, that counsel for Gasparino would not have negotiated on this basis in order to avoid a murder indictment.

Counsel has conceded that the terms "statutory" or "transactional" immunity were never used and counsel's assertion that the agreement was for "complete" immunity is, of course, a conclusion of law and not a statement of fact. It is significant to note that in his papers below, counsel for petitioner has asserted that in the discussions with the Assistant District Attorney the issue was raised that the petitioner, when apprehended, had had found in his home some policy slips, and further, that it was discovered that his automobile was a stolen one. Counsel claims that there was an assurance by the District Attorney that these matters would also be "immunized". Counsel must have known full well that statutory immunity only attaches with respect to crimes concerning which the witness is questioned in the Grand Jury, and certainly the stolen automobile and the policy slips, being completely irrelevant to the investigation then being conducted by the Grand Jury, would not have been the subject of Gasparino's testimony

before the DeTore and Wedra Grand Jury, and therefore, could not conceivably have resulted in statutory transactional immunity. It is therefore perfectly clear that when counsel relied on the statement of the District Attorney that these crimes would also be immunized, he was relying upon the good faith promise of the prosecutor not to prosecute, and not on proceedings pursuant to Section 619-c, *et seq.* of the Code of Criminal Procedure. It is perfectly clear from this assertion with respect to the discussion of the policy slips and the automobile that the agreement involved was a general accommodation in which the good faith of the prosecutorial authorities was relied on and not an agreement for the creation of a technical statutory immunity, despite the Monday morning quarterbacking about it.

It should be parenthetically pointed out that the prosecutor has throughout these proceedings in fact acted in good faith. This is perfectly apparent from the situation of Vito Di Tomasso, another middle man in the murder, who was also represented by Mr. Lanna and who received no more, nor less protection than Nicholas Gasparino, and who was permitted to testify at trial by Mr. Lanna without a final clarification from counsel's point of view as to the type of immunity that he had received. Vito Di Tomasso is not under any criminal charges and is at large. The prosecutor has kept his word, which was conditioned upon Di Tomasso's keeping his. Even after Gasparino initially indicated that he would not testify and even after the District Attorney learned of the existence of the previously unknown witness who could fill the void that Gasparino's proposed defection would have created, nevertheless, the District Attorney took every reasonable step to convince Gasparino and his counsel that he should still testify. The defendant was not mousetrapped into his present position. Indeed, after discussion with his counsel in which the legal position of the District Attorney was clearly set forth, the

record indicates that there was a conference between the undersigned, Gasparino, and his counsel, and stenographic minutes thereof were taken. Gasparino was advised fully and clearly that it was the position of the District Attorney that he did not have statutory immunity, but that the District Attorney had promised that if he cooperated he would not be prosecuted. Further, he was advised that if he refused to testify he would be indicted for murder and prosecuted. Despite this, he refused to testify without offering any reasonable explanation. Certainly the subsequent indictment was not an act of bad faith and was completely consistent with the obvious intent of the prior agreement and predicated upon the act of bad faith and cupidity by the defendant. It is also interesting to note that Gasparino was called to the witness stand in the DeTore and Wedra trial in the absence of the jury where, with the assistance of counsel, he asserted his privilege against self-incrimination, a privilege which would have been absolutely inconsistent with his position that he had statutory immunity. It is also significant to note that while Mr. Lanna, with respect to Vito Di Tomasso, simply asked the Court to reconfirm whatever type of immunity Di Tomasso had received before the Grand Jury, no application of any type with respect to that or any other protection was made by counsel to the Court with respect to Gasparino before his refusal to testify was interjected. The bad faith here is certainly attributable to the appellant and not the District Attorney. Nor is any criticism of counsel implied. It is questionable what else could have been done by an attorney for Gasparino. Certainly, Vito Di Tomasso has been well represented and Gasparino's predicament results not from a failure on the part of his counsel, but from his own unexplained bad faith. There remains the simple and inescapable conclusion that Nicholas Gasparino refused to testify for the purpose of obstructing the prosecution; it is clear here that the appellant's purpose was pernicious, and indeed, even if this

were a close equitable question, which it is respectfully submitted it is not, that very fact should decide the matter against the appellant.

Based, apparently, on a belief that by virtue of immunity laws he could outsmart the prosecution and have his cake and eat it also, Gasparino declined to testify at the DeTore-Wedra trial, asserting his right against self-incrimination, a right totally inconsistent with the claim he now makes that he had received transactional immunity. The defendant should not, in all equity, be permitted to play at ducks and drakes with the law. Due process of law in its fullest sense not only permits but requires a finding against the defendant on this issue.

CONCLUSION

It is, therefore, respectfully submitted that the instant petition for certiorari should be denied.

Respectfully submitted,

CARL A. VERGARI
District Attorney of Westchester County
Office and Post Office Address
County Courthouse
White Plains, New York 10601

914-761-1144

By: B. ANTHONY MOROSCO
Administrative Assistant
District Attorney

JAMES M. ROSE
Assistant District Attorney

CARL F. LODES
Assistant District Attorney
Of Counsel